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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1176

106 FORSYTH CORPORATION,
d/b/a PARIS THEATRE,
Petitioner,

v.

JULIUS F. BISHOP, In his capacity
as Mayor of the City of Athens,
Georgia; and
Aldermen and members of the
Council of the City of
Athens, Georgia,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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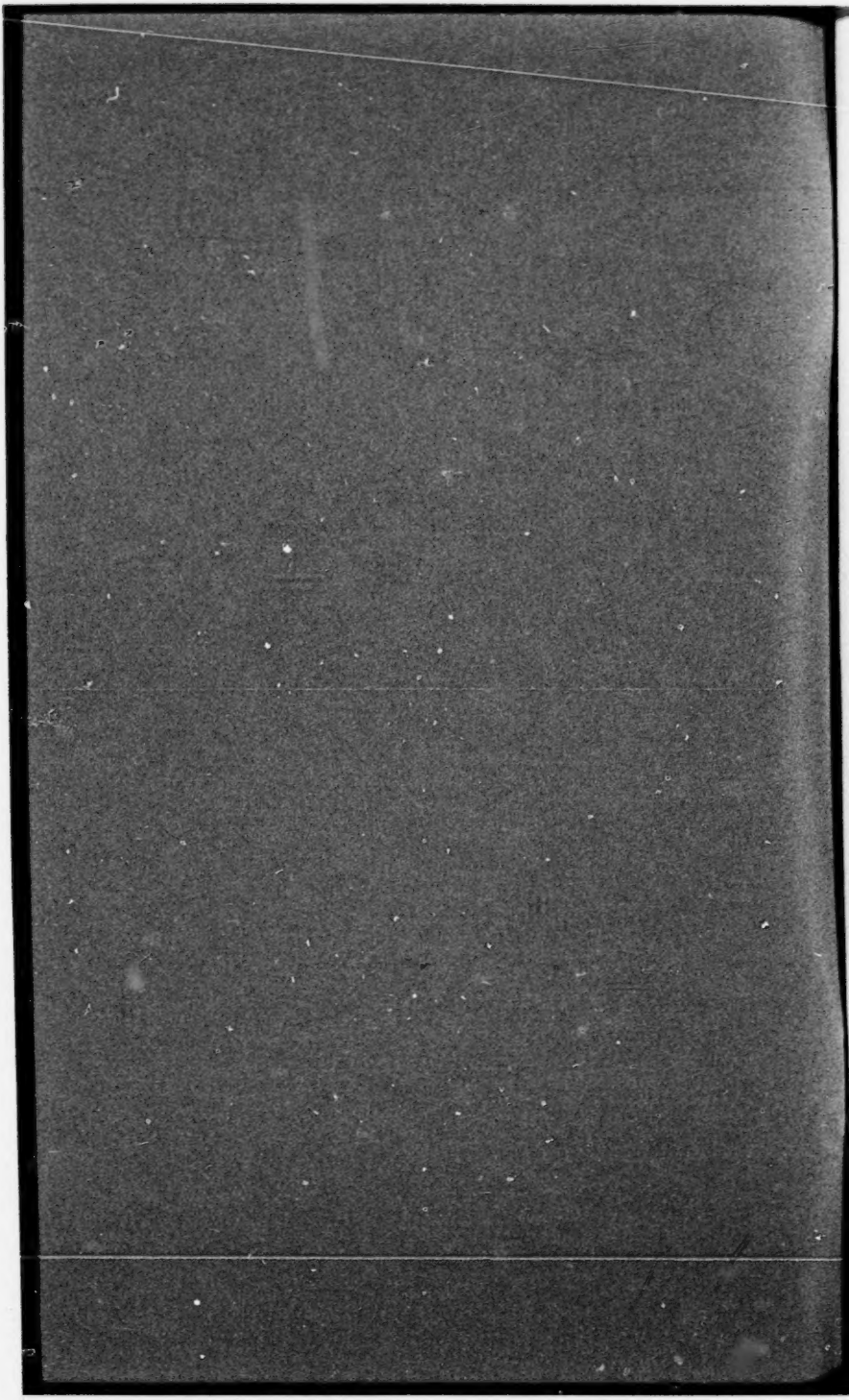

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

106 FORSYTH CORPORATION, d/b/a PARIS THEATRE, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 19, 1973.

OPINIONS BELOW

The memorandum opinion of the District Court is reported at *362 F. Supp. 1389* (1972) and is also included herein as Appendix "A". The opinion of the Court of Appeals is reported at *482 F.2d 280* (1973) and attached hereto as Appendix "B". The Petition for Rehearing was denied on November 2, 1973 and is included herein as Appendix "C".

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1973 and the Petition for Rehearing was denied on November 2, 1973. This petition for writ of certiorari is being filed within ninety (90) days from the date of the denial of the Petition for Rehearing, as required by *Title 28 U.S.C. § 2101, Subsection (c).* The jurisdiction of this Court is invoked under *Title 28, U.S.C. § 1254 (1).*

QUESTION PRESENTED

Are the revocation provisions of a city business licensing ordinance as written, which would prohibit the future operation of a commercial motion picture theatre based on past isolated violations of a state obscenity law repugnant to the First and Fourteenth Amendments to the Constitution of the United States as a prohibited prior restraint?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First* and *Fourteenth Amendments* to the *Constitution of the United States,* as well

as the pertinent provisions of *Section 417* of the license ordinance of the City of Athens, Georgia, 1971 as amended, are set forth in Appendix D, attached hereto.

STATEMENT OF THE CASE

On December 14, 1971 the Mayor and City Council of the City of Athens, Georgia gave written notice to the 106 Forsyth Corporation, d/b/a Paris Theatre, that the theatre management was to show cause on December 20, 1971 at a council meeting to be held that evening, why its business license should not be revoked for two (2) alleged violations of *Georgia Code 26-2101* (obscenity statute). The ordinance pursuant to which said revocation hearing was said to be authorized is set forth herein as Appendix "D".

On or about December 21, 1971 petitioner herein filed a *Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction* and *Declaratory Judgment* in the U.S. District Court for the Middle District of Georgia, Athens Division, Civil Action File No. 792. By its complaint, petitioner sought to obtain injunctive relief against the proposed revocation of the business license by the Mayor and City Council for alleged violations of the Georgia obscenity statute, as well as a declaratory judgment to determine the constitutionality of *Section 417* of the license ordinance of the City of Athens, Georgia, which facially would require the city council and mayor to revoke the business license issued for the operation of a motion picture theatre.

This ordinance provision was passed by the Mayor and City Council after the Petitioner opened his theatre in

downtown Athens, and was obviously designed to selectively apply to petitioner's business operation.

By agreement of the parties, the proposed hearing was postponed pending a hearing and no temporary order was entered. Instead, the application for preliminary injunction was set down for hearing on December 29, 1971. The mayor and city council, by their attorneys, filed a *Motion to Dismiss* on the grounds that the complaint failed to state a claim on which relief could be granted.

The court made its decision on February 2, 1972 dismissing the complaint and the opinion is reported at *362 F. Supp. 1389.* It developed during the hearing that the Mayor before whom the revocation hearing was to be conducted had previously appeard as an expert witness for the State in a criminal prosecution against employees of the theatre operated by Petitioner.

It is a fact that the employees were convicted for violation of the Georgia obscenity laws on the dates indicated in the notice of revocation hearing from the Mayor and City Council, attached hereto as Appendix "E". However, it is also a fact that those convictions were reversed by the Georgia Court of Appeals for manifest errors prejudicial to the rights of the defendants committed by the trial court during the trial. This reversal occurred while the within matter was pending decision before the Circuit Court of Appeals.

HOW FEDERAL QUESTIONS ARE PRESENTED

The complaint originally filed by petitioner in this case in the United States District Court, in pages 10, 11 and 12,

contained petitioner's allegations as to why the ordinance was unconstitutional. Reference should be made to those pages as of the complaint as attached in the Appendix as "E".

In summary, petitioner was complaining that the ordinance, *Section 417* as amended, was (a) void for overbreadth and invaded the area of protected freedoms in that the ordinance set forth no standards to guide the legislative and administrative officials in revoking or attempting to revoke the business license of firms engaged in the exhibition for profit of presumptively protected *First Amendment* materials; (b) that the provisions of the ordinance with respect to revocation or suspension of business license were void for vagueness in that the same permit revocation of license in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such were repugnant to the *First Amendment* clause; (c) the ordinance provision were repugnant to the due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because they permit deprivation of property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means by the mayor and city council without a showing of any real and substantial relationship to the city's subordinating interest which is compelling to justify city action limiting the exercise by petitioner of its *First Amendment Freedoms;* (d) the ordinance provision were impermissibly broad and repugnant to the procedural due process requirements of the *Fifth* and *Fourteenth Amendments* by employing means lacking adequate safeguards which due process demands to assure non-obscene materials

sought to be exhibited as a business activity the constitutional protection of the *First Amendment;* (e) that the ordinance requires that the burden of proof and persuasion be upon petitioner, which is an unconstitutional prior restraint and did not effect the procedural safeguards as required in *First Amendment* matters. The ordinance throws upon the petitioner the burden of instituting judicial review and meeting that burden of proof required to protect those inalienable rights secured to citizens by the *Constitution* and *Amendments* thereto, and does not afford procedural safeguards and place the burden on the censor as is constitutionall required.

Petitioner requested a declaratory judgment under the provisions of *Title 28 U.S.C.* § *2201* and *Rule 57* of the *Federal Rules of Civil Procedure* to declare §*417* of the license ordinance of the City Athens for the year 1971 as amended to be unconstitutional and as applied in the case herein. The petitioner further requested that an injunction issue after hearing to enjoin the Mayor and City Council from attempting to revoke petitioner's business license. The relief sought was denied.

Whereupon a timely appeal was filed in the United States Court of Appeals for the Fifth Circuit. The issues raised interslip the unconstitutionality of §*417* both as written and applied of the licensing code of the City of Athens and in a *per curiam* opinion of that court, the judgment of the trial court was affirmed, 482 F.2d 280. The opinion upheld the constitutionality of the provisions of the ordinance by the following language:

> "In affirming the court below, we hold premising the revocation of a movie house license upon a violation of a valid State law or city ordinance forbidding the exhibition of sexually explicit material, does not violate the right of free speech vouched safe under the First Amendment. Moreover, we find no constitutional infirmity in the revocation procedures under the circumstances of this case."

All other questions raised by the appeal were not reached by the appellate court.

REASONS FOR GRANTING THE WRIT

THE REVOCATION PROVISIONS OF A CITY BUSINESS LICENSING ORDINANCE TO PROHIBIT THE OPERATION OF A MOTION PICTURE THEATRE OFFERING PRESUMPTIVELY PROTECTED MATERIALS BASED ON THE VIOLATION OF THE CITY AND/OR STATE OBSCENITY LAW CONSTITUTES A PRIOR RESTRAINT PROHIBITED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

It is uncontroverted that the petitioner was issued a license to operate its motion picture theatre on April 15, 1971. On June 22, 1971 the City of Athens, Georgia adopted its amendment to *Section 417* of the license ordinance of the City of Athens, and it was contended throughout the proceedings that the revocation provisions of the ordinance were adopted to be specifically addressed to this theatre operation.

The ordinance as written would permit the mayor and city council to revoke the business license of petitioner operating a motion picture theatre based upon a conviction of any employees of the petitioner or petitioner itself for violation of any State statute or city ordinance relating to obscenity. Effectively speaking, the showing of a film which is held to be obscene would terminate the right of the theatre operation to show *any* films in the future, whether originating from the studios of Walt Disney or the Mitchell Brothers (the producers of "Behind the Green Door"). This Court has noted probable jurisdiction in *Jenkins v. Georgia,* No. 73-557. In that case a general Theatre (as opposed to an Adult Film Fare Theatre) operating in the City of Albany, Georgia exhibited a film entitled "Carnal Knowledge," which had been well received throughout the United States, favorably reviewed by the movie critics, and nominated for several academy awards. Mr. Jenkins was charged with having violated the State obscenity laws by exhibiting "Carnal Knowledge" and convicted for showing an obscene film at the theatre.

Under the rationale of the ordinance challenged herein, that kind of conviction would be sufficient to justify the absolute revocation of a business license which, as stated before, would prohibit a theatre from further operation as a theatre. This kind of ordinance represents potential for invidious prior restraint and would induce self-censorship on the part of the petitioner and other theatre operators in that no one would want to commercially exhibit films to the public which might be classified by a State statute or city ordinance as obscene, under penalty of losing their business license.

In *Burstyn v. Wilson*, 343 U.S. 495, this Court stated:

> "... we conclude that expression by means of motion pictures was included within the free speech and free speech guaranty of the First and Fourteenth Amendments."

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court stated:

> "... in instances that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, Smith v. People of the State of California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205; Marcus v. Search Warrant, supra, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks."

In *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175, at pp. 180 and 181 this Court said:

> Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment."

The elimination of prior restraints has been found by this Court to be a leading purpose in the adoption of the *First*

Amendment. See *Lovell v. Griffin,* 303 U.S. 444, at pp. 451-452 (1938) and *Carroll v. President and Commissioners of Princess Anne County* (1968) supra.

This Court has emphasized time and time again "... a system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan,* 372 U.S. at p. 70.

The principle arguments against the constitutionality of this ordinance can be broken into two categories: (a) the concept itself of the licensing ordinance being utilized to effect prior restraint in the area dealing with *First Amendment* freedoms, and (b) the lack of constitutionally mandated procedural safeguards to obviate the dangers of a censorship system.

1. *PRIOR RESTRAINT THROUGH THE UTILIZATION OF THE REVOCATION PROVISIONS OF A BUSINESS LICENSING ORDINANCE.*

The Court of Appeals for the Fifth Circuit, in its decision at 482 F.2d, 281 stated:

> "In affirming the court below, we hold premising the revocation of a movie house license upon a violation of a valid State law or city ordinance forbidding the exhibition of sexually explicit material, does not violate the right of free speech vouched safe under the First Amendment.

The ruling of the Fifth Circuit is clearly in error and does not comport with the case law developed by this Court with regard to prior restraint and the *First Amendment.*

Recently this Court had a lot to say about the subject of pornography and obscenity in decisions rendered on June 21 and June 25, 1973. In several of those decisions this Court took great effort to be sure it was understood that the utilization of a civil or criminal process by government was to ensure that no prior restraint occurred. Briefly, the language from the several cases re-emphasing this Court's prior rulings on the issue of the *First Amendment* and prior restraint was as follows:

A. *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 55.

"... Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of *Blount v. Rizzi,* 400 U.S. 410, 417 (1971); *Teitle Film Corp. v. Cusack,* 390 U.S. 139, 141-142 (1968); *Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965), and *Kingsley Books, Inc. v. Browns,* supra, 354 U.S. at 443-445 (1967) were met. Cf. *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 367-369 (1971) (opinion of White, J.) ..."

"... 2. The Georgia Civil procedure followed here (*assuming use of a constitutionally acceptable standard for determining the issue of obscenity vel non*) comported with the standards of *Teitel Film Corp. v. Cusack,* 390 U.S. 139; *Freedman v. Maryland,* 380 U.S. 51; and *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 .."

B. *Heller v. State of New York,* 413 U.S. 483, 490.

"... In this case, of course, the film was not subjected to any form of 'final restraint,' in the sense

of being enjoined from exhibition or threatened with destruction. (a copy of the film was temporarily detained in order to *preserve it as evidence.*) There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case,did temporary restraint, in itself 'become a form of censorship,' even making the doubtful assumption that no other copies of the film existed. Cf. *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 367 (1971); *Freedman v. Maryland,* 380 U.S. 51, 57-59 (1965).

C. *Roaden v. Commonwealth of Kentucky,* 413 U.S. 496, 503, 504.

"... The common thread of *Marcus, Quantity of Books,* and *Lee Art Theatre* is to be found in the nature of the materials seized and the setting in which they were taken. See *Stanford v. Texas,* 379 U.S. 476, 486 (1965). In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such

> Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression.' As we stated in *Stanford v. Texas,* supra:
> 'In short . . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See *Marcus v. Search Warrant,* 367 U.S. 717; *A Quantity of Books v. Kansas,* 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms.

Reading carefully the decisions in *Heller* and *Roaden,* it is clear that the only thing authorized in the context of seizures within the pneumbra of the *First Amendment* would be single copies of the matter alleged to be obscene, and under no circumstances was the store facility to be stopped from engaging in the activity of disseminating and/or exhibiting materials presumptively protected. This Court has never sanctioned the closing of a facility offering motion picture films, magazines, books and other publications presumptively protected by the *First Amendment* until ruled to be otherwise under nuisance, criminal or zoning laws, and the decisions of June 21, and 25, 1973 have not changed or altered the careful respect that this Court affords First Amendment Questions. Various Federal and State Courts have already ruled on the cases presented to them that it would be a constitutionally impermissible prior restraint to allow the State to close the facility by either denying a license and/or as a nuisance for past conduct by employees and/or owners which may have been in violation of State law. A brief listing of the cases to which we make reference is as follows:

A. *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967);

B. *Mitchum v. Florida, ex rel Schaub,* 250 So.2d 883 (1971);

C. *Indiana ex rel Blee v. Mohney,* 289 N.E.2d 519 (1972) (Transfer to Indiana Supreme Court denied 5/14/73);

D. *Grove Press, Inc. v. City of Philadelphia,* 418 F.2d 82 (CA-3, 1969);

E. *Oregon Bookmart Corp. v. Schrunk,* 321 F. Supp. 639 (D.C. Oregon, 1970);

F. *State ex rel Little Beaver Theatre v. Tobin,* 258 So.2d 30 (Fla. 1970);

G. *Broadway Distributors, Inc. v. White, et al.* (D.C. mass. 1970);

H. *McCright, et al v. Olson,* ___ F. Supp. ___ (D.C.N.D., Civ. No. 4849, 12/17/73);

I. *McKinney, et al v. City of Birmingham,* ___So.2d ___ Court of Criminal Appeals of Alabama, Sixth Division, Nos. 572, 573, 574, 575, 576, 578, 579, 580, 581, 583, 584, (1/15/74)

Indeed, most recently the U.S. Supreme Court has had an opportunity to consider this overall concept in a case in which this counsel has participated entitled *Huffman v. U.S. District Court for the Northern District of Ohio, et al.,* No. 72-1613. Jurisdictional Statement filed, No. 73-296. A

three-judge court out of the Northern District of Ohio, Western Division, on April 20, 1973 held in part that the Ohio Nuisance Statute that authorized closing of the theatre which exhibited obscene movies was unconstitutional. In the decision in that case, the Court enjoined the enforcement of the Ohio nuisance law that authorized the closing of a theatre for a period of one (1) year. The Court's decision reads in pertinent part as follows:

> "Although a prior adversary hearing was conducted with respect to some sixteen (16) films in the theatre's possession prior to the State court's final judgment, the statute provides for no such hearing on any other films which the operator may have intended to show during the one (1) year period."

The question of the closing of a facility offering presumptively protected First Amendment entertainment to the interested adult public under a nuisance law is involved in a case before this Court in which oral argument was heard on January 7, 1974. *Speight, and Chandler v. Slaton,* No. 72-1557.

If we are to follow the rationale of the Appellate Court to which we have made objection, it is conceivable that had the *New York Times* been convicted under some State of New York law that may have prohibited the publishing of classified government documents, that for such a violation under the rationale suggested by this decision the revocation of the business license of the *New York Times* to do business would be constitutionally permissible. We suggest that that is precisely what has been condemned in *Near v. Minnesota,* 283 U.S. 697-738, and the fact that some regularly established business activity may be convicted directly or through its

employees for violation of the State law of the sale of alleged obscene material does not mean that other materials offered for sale in the store and to be offered in the future would be equally as obscene, and, hence, the revocation of a business license for a conviction under a State statute or city ordinance would be a collateral punishment that would be a prohibited prior restraint and cause a "chilling effect" on the exercise of *First Amendment* freedoms, and it is precisely to this problem of potential self-censorship that this Court has directed a vast number of its cases involving prior restraints.

Indeed, the original revocation proceeding in the case at bar was initially founded on the concept that several employees of plaintiff had been convicted in State court for the exhibition of obscene material in violation of the State of Georgia obscenity law and thereafter the license revocation was alleged to be proper. The Court of Appeals of the State of Georgia reversed the convictions in a case that sought to be the predicate of the license revocation on March 14, 1973 on other grounds. (see *Fishman, et al v. State,* 128 Ga. App. 505.)

The adversary proceeding contemplated in the case of *Freedman v. Maryland,* 380 U.S. 51 (1965) and *Paris Adult Theatre, I, et al v. Slaton,* supra, related to a hearing as to the question of obscenity of individually named motion picture films. *Heller* and *Roaden* support the proposition that no mass seizure may be made to interfere with the operation of a regularly established business activity of dispensing or offering to the interested adult public sexually oriented press materials. It is in this context that counsel for petitioner urges this Court to consider this question as it relates to permitting

the revocation of motion picture theatre licenses upon violation of State laws or city ordinances pertaining to obscenity. We, of course, agree that if a legally established business facility offering sexually oriented press materials was involved in the violation of some State or local criminal law other than dealing with the nature of the material exhibited or of some otherwise valid zoning taxing ordinance, then the revocation of the business license in that context could be proper, provided, however, that said revocation procedures would apply equally to any or all licensed business facilities without regard to the nature of the product being traded.

2. *PROCEDURAL SAFEGUARDS*

Section 417 of the licensing ordinance of the City of Athens, *Subsection 2b* as adopted on June 22, 1971 permits a revocation of a business license as follows:

> "Violation of the law of the State of Georgia which affects the public health, welfare and safety and which violation occurred as a part of the main business activity licensed and not merely incidental thereto."

Subsection 2a of the ordinance would permit business license revocation for

> "Violation of other ordinances of the city pertaining to the carrying on of such business such as would affect the health, safety and welfare of the public."

Under the provisions of *Section 417* of the licensing ordinance of the City of Athens, Georgia as amended, a letter was sent Petitioner dated December 14, 1971 from the Mayor and Council of the City of Athens and it stated in pertinent part:

> "You are hereby notified to show cause before the mayor and council of the City of Athens, at 6:30 P.M. on the 20th day of December, 1971 in council's chambers at the City Hall, Athens, Georgia, as to why your business license for the operation of a motion picture theatre or movie theatre . . . should not be revoked . . .

The letter went on to say

> "You are directed to show cause at the above time and place as to why your business license to operate a motion picture theatre . . . should not be revoked for the reasons specified herein and you will be afforded a full hearing and given an opportunity to present any legal evidence you may see fit in your behalf and you may employ counsel if you desire."

This Court said in *Freedman v. Maryland,* 380 U.S. 51, at p. 58:

> " . . . a non-criminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' "

In *Blount v. Rizzi,* 400 U.S. 410, this Court reaffirmed its holding in *Freedman v. Maryland,* supra, with the following observation:

> " . . . We held that to avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require 'prompt judicial review' – a final judicial determination on the merits within a

> specified, brief period – to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination . . . "

In *Teitel Film Corp. v. Cusack,* 390 U.S. 139 (1968) at p. 141, this Court stated in essence that a non-criminal process avoids constitutional infirmity when the exhibitor is assured by statute or authoritative judicial construction that the *censor will,* within a *specified brief period,* either issue a license or go to Court to restrain the showing of the film. The procedure, to pass constitutional muster, must also assure a prompt, final judicial decision to minimize the deterrent effect. The Court was quoting in part from its earlier decision in matters of this type (*Freedman v. Maryland,* supra).

This Court has always insisted " . . . upon careful procedural provisions designed to assure the fullest presentation and consideration of the matter which the circumstances permit." *Carroll v. President and Commissioners of Princess Anne County,* 393 U.S. at p. 181.

The trial court found that the mayor and city council could try petitioner on the revocation matter under its ordinance even though that would necessitate a determination as to the scope of the protections afforded petitioner by the *First and Fourteenth Amendments* (see 362 F. Supp. 389 at pp. 1395 and 1396).

In *Jodbar Cinema v. Sedita,* 309 F. Supp. 868 (1970) a case strikingly parallel to the one at bar upon its facts, the Court held that since there was no requirement that a prompt

judicial review be given the plaintiff in that matter from the decision of the mayor as to whether the license should be revoked, the Court found the revocation scheme to be unconstitutional (see pp. 877 and 878).

In *Blount v. Rizzi,* supra, this Court held that the administrative censorship scheme created by *Title 39 U.S.C.* §*4006* and §*4007* violated the *First Amendment* since it lacked adequate procedural safeguards against undue inhibition of protected expression. The Court said in that case:

> "Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . . Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . . ' *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963). Since we have recognized that 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ' *Speiser v. Randall,* 357 U.S. 513, 525 (1958)" *Blount v. Rizzi, supra,* at 416, 417."

After noting that the procedure established by §*4006* and the regulations implementing it omit the "sensitive tools" essential to satisfy the requirements of the *First Amendment,* Mr. Justice Brennan expressly held that the three-judge courts

correctly held that *Freedman v. Maryland,* 380 U.S. 51 (1965) compels this conclusion. He went on to discuss *Freedman v. Maryland, supra,* as follows:

> "We there considered the constitutionality of a motion picture censorship procedure administered by a State Board of Censors. We held that to avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require 'prompt judicial review' – a final judicial determination on the merits within a specified, brief period – to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination. 380 U.S., at 58-60.
>
> "These safeguards are lacking in the administrative censorship scheme created by §§ *4006, 4007, and the regulations.*
>
> "The scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure which bars the magazines from the mails, or even any provision assuring prompt judicial review. The scheme does differ from the Maryland scheme involved in *Freedman* in that under the Maryland scheme the motion picture could not be exhibited pending conclusion of the administrative hearing, whereas under §4006 the order to return mail or to refuse to pay money orders is not imposed until there has been a administrative determination that the magazines are obscene. This, however, does not redress the fatal flaw of the procedure in failing to

> require that the Postmaster General seek to obtain a prompt judicial determination of the obscenity of the material; rather, once the administrative proceedings disapprove the magazines the distributor 'must assume the burden of instituting judicial proceedings and of persuading the courts that the . . . [magazines are] protected expression.' 380 U.S., at 59-60. The First Amendment demands that the Government must assume this burden. 'The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffers to impose a valid final restraint.' 380 U.S., at 58." *Blount v. Rizzi, supra* at 417, 418.

At this point in the opinion, a footnote referred to the opinion of Mr. Justice Brennan in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 518-519 (1962), wherein he wrote for three Justices as follows:

> "[We have] . . . no doubt that Congress would constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts."

It is submitted that what Congress cannot do, neither the State of Georgia nor its political subdivision, the City of Athens, may do.

The opinion of the trial and Appellate Courts relies heavily upon the statement of counsel for Respondents that

no action would be taken in the event of a ruling favorable to the Mayor and Council to revoke the license until Petitioner hereto has had full opportunity to exhaust all appellate review. Petitioner is assured that it has the burden to obtain a review of the decision of the Mayor and Aldermen by *certiorari* to the appropriate superior court and to obtain from such court "a supersedeas of the judgment until the final hearing in the superior court" in this description of the Court.

This position ignores the clear language contained in *Freedman* and reiterated in *Blount v. Rizzi* that the governing body making the administrative determination must assume the burden of securing appellate review:

> "This, however, does not redress the fatal flaw of the procedure in failing to require that the Postmaster General seek to obtain a prompt judicial determination of the obscenity of the material; rather, once the administrative proceedings disapprove the magazines the distributors 'must assume the burden of instituting judicial proceedings and of persuading the courts that the ... [magazines are] protected expression.' 380 U.S., at 59-60. The First Amendment demands that the Government must assume this burden." *Blount v. Rizzi, supra* at 418.

The Mayor and City Council and the trial court equate a willingness to sit by and watch the Petitioner try to extricate itself by legal process of judicial review from the morass the Mayor and Council can put it into before revoking the license without compliance with *Freedman* and *Blount.*

Even assuming the Petitioner were able to persuade the appropriate Superior Court judge to sanction the *writ of*

certiorari, there are no provisions in Georgia law requiring that a prompt judicial decision be made by him. Moreover, the procedure contemplates that an answer be filed by the trial judge or, in this case, by the Mayor and Council which verifies the grounds stated in the petition. If such an answer is not filed, the *petition for certiorari* will be subject to dismissal. *Morris v. Battey,* 31 Ga. App. 438 (1923) and cases cited. In other words, the appellate review must be instituted by the Petitioner not the censor and it can be frustrated by inaction on the part of the party whose decision is being complained of. No matter how solemn the statement is made that no action will be taken pending the completion of appellate review, the fact remains that action *may* be taken under the Georgia procedure until the *writ of certiorari* is sanctioned. *Ga. Code* § *19-213.*

The trial court apparently felt that since the films made the basis of charges one and two had already been shown, there was no impermissible prior restraint (App. pp. 103-104). This contention was discussed in *Jodbar Cinema, Ltd. v. Sedita, supra* at 878 and rejected:

> "Unlike the factual situations in *Freedman, Teitel,* and *Interstate Circuit* where prior restraint was imposed on a single film, the effect of the Mayor's license revocation here is more pervasive because it inhibits, under penalty of a Section 14 violation, the plaintiff from exhibiting any films after the date of the license revocation. This inhibition is without regard to the theme or subject matter of future films to be shown by the plaintiff."

In the case at bar, Petitioner would be prohibited from exhibiting any films after the date of the license revocation (if

unappealed, or if appealed, after review), just as was the situation in *Jodbar.*

The case of *Near v. Minnesota, ex rel Olson,* 203 W.S. 697 (1931), the classic prior restraint case, is instructive. In that case, a Minnesota statute which authorized suits to abate as a nuisance, publication of "a malicious, scandalous and defamatory newspaper, magazine or other periodical" was held unconstitutional.

The trial court distinguished *Near v. Minnesota* on the ground that:

> "The purpose of the proposed hearing is not to place upon plaintiff any previous restraint with request to any films it may plan to show but to call plaintiff to account and to hold the plaintiff responsible for its alleged past abuses. . . " (App., p. 104).

Significantly, the City of Athens has no ordinances prohibiting the exhibition of obscene movies. More significantly, the purpose of the proposed hearing was stated by counsel for Mayor and City Council to be other than that supposed by the trial court:

> "This is a matter of public welfare and concern and interest, and this would be *the interest of the City of Athens, is to deter the exhibition* of this type of material, which also *would* violate the Georgia obscenity law." (App. p. 51). (Emphasis supplied.)

This places the matter squarely within *Near v. Minnesota* wherein Chief Justice Hughes stated, at 283 U.S. 711, as follows:

> "The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal."

Compare the last sentence above with the following, again from the counsel for Defendants-Appellees at the hearing:

> "*Now if the City of Athens has to wait on any violations of a state law* – and all criminal laws presumptively do affect the public health, welfare and safety, otherwise they wouldn't be enacted. They carry that presumption, that's the purpose, for the protection of society. *If the City of Athens would have to wait for example on a beer license case until the individual who sold the beer was convicted before we could revoke the license it would certainly be a great hindrance in the municipal affairs. . . .*" (App. p. 52). (Emphasis supplied.)

Even if it be assumed that a "beer license case", presumably involving the violation of a *city ordinance*, could be expedited without the "hindrance" of a trial and conviction prior to revocation, Petitioner finds itself profoundly disturbed at the suggestion that the protections afforded by the *First Amendment* to the *Constitution of the United States* would be subject to the same cursory process. Petitioner knows of no authority in law for the proposition, with the exception of the case at bar.

After a careful review of the ordinance of the City of Athens herein in question, it is clear that such is an

unconstitutional prior restraint on freedom of expression as defined by the cases herein cited. The ordinance in question fails to (1) provide even the most minimal constitutional safeguards such as prompt judicial review on the merits of the administrative determination by the censors; (2) place the burden of initiating judicial review on the censors; (3) limit the preservation of the *status quo* to the shortest fixed period compatible with sound judicial resolution of any restraint imposed in advance of final judicial determination and (4) does not set forth specific and concrete standards to be applied in the application of said ordinance, leaving no unfettered discretion to the censor.

CONCLUSION

It is contended by counsel for petitioner herein that the decision of the Fifth Circuit appealed from is in error and does not comport with the decisions of this Court in determining constitutional rights afforded those who seek to engage in the exercise of *First Amendment* rights.

We have submitted for the Court's consideration the proposition that the ordinance is unconstitutional on its face because of the concept involved, and this, is a matter of substance; that is to say, (a) that a license revocation to operate a *First Amendment* facility *in future* can be premised on a violation of a State or city law in the past appertaining to obscenity, and (b) that the constitutionally mandated procedural safeguards required as "sensitive tools" for dealing with presumptively protected *First Amendment* materials and the right to exhibit the same be scrupulously observed, and the requirement that provisions for those safeguards be

inherent in or built into the law under which such hearings are held are all absent in the operation of the ordinance in question.

For the reasons submitted, we respectfully pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

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106 FORSYTH CORPORATION d/b/a
Paris Theatre, Petitioner,
v.
Julius F. BISHOP, In his capacity as
Mayor of the City of Athens, et al.,
Defendants, Jointly and Severally.
Civ. A. No. 792.
United States District Court,
M. D. Georgia,
Athens Division.
Feb. 2, 1972

BOOTLE, District Judge:

The plaintiff, 106 Forsyth Corporation d/b/a Paris Theatre, sues the Mayor and Board of Aldermen of the City of Athens in their official capacities seeking injunctive relief against the City's proposed conducting of a hearing to determine whether plaintiff's license to operate a movie theater in the City of Athens should be revoked and asks also for a declaratory judgment declaring unconstitutional the provisions of a municipal ordinance providing for such hearing and declaring unconstitutional also a Municipal Zoning Ordinance and the State enabling statute. The parties have been granted a hearing at which they chose to introduce no evidence but to rely upon the pleadings and certain stipulations.

The facts as they appear from the pleadings and said stipulations are as follows. The plaintiff was issued its license to conduct said theater on April 15, 1971. On or about December 14, 1971, the defendants served upon the plaintiff a written notice, and on or about December 29, 1971, an additional notice, which notices are hereinafter discussed.

As will be observed from said notice of December 14, 1971 the Mayor and Council propose to conduct a hearing to determine whether plaintiff's license should be revoked upon the grounds: (1) that on December 6, 1971, plaintiff intentionally exhibited to the general public a specified film which "contained obscene and indecent scenes and acts by nude women and men of sexual intercourse, cunnilingus, and fellatio, which material considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest in nudity, sex, and excretion and is utterly without redeeming social value and transgresses substantially beyond customary limits of candor in describing and representing such matters contrary to the laws of this State as aforesaid" which constituted a "violation of Section 26-2101, Georgia Code", and (2) that on July 10, 1971 the plaintiff exhibited a specified obscene motion picture which "contained obscene and indecent acts of sexual intercourse between nude men and women, which material when considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest in nudity, sex or excretion and is utterly without redeeming social value and transgresses substantially beyond customary limits of candor in describing and representing said matters, contrary to the laws of said State as aforesaid" which was "violation of Section 26-2101, Georgia Code." And as appears from said notice of December 29, 1971, the defendants propose to determine at said hearing whether said license should be revoked upon the further ground that the plaintiff is conducting an "Adult Movie House" "within 200 yards of the First United Methodist Church of Athens" as prohibited by an ordinance of the City of Athens adopted July 6, 1971 pursuant to authorization of an Act of the Georgia Legislature approved April 13, 1971.

With respect to proposed grounds number 1 and number 2 plaintiff contends that its license cannot be legally revoked under the procedure proposed by the City in that there has thus far been no judicial determination that either movie

complained of is obscene; that to revoke said license by virtue of any determination of obscenity made by the Mayor and Council would be equivalent to the imposition of a previous restraint upon plaintiff with respect to said two films and with respect to any and all other films it might plan to exhibit in the future; that the Mayor and Council is not so legally constituted as to be capable of affording a judicial determination of obscenity and that accordingly its license cannot be legally revoked by the proposed procedure even assuming arguendo that said movies are obscene. And with respect to the third ground of revocation, the plaintiff contends that the state statute under which said ordinance of July 6, 1971 was adopted and the ordinance itself are unconstitutional as written and as applied because they deny equal protection of the law to plaintiff and impinge upon the First Amendment guarantees of free speech and press and seeks the convening of a three-judge court to grant a declaratory judgment to that effect.

On the other hand, the defendants contend with respect to Grounds One and Two that the power of a municipality to require a license implies the power to revoke it for a sufficient cause; that if, indeed, plaintiff exhibited obscene movies thus violating the criminal statutes of the State of Georgia such exhibition and violation constitute sufficient cause for revocation; that the Mayor and Council is the appropriate body to pass upon the question of revocation and is the appropriate body initially to determine judicially whether plaintiff violated the Georgia statutes by exhibiting obscene films; that no previous restraint is involved but merely a question of revocation of a business license for past conduct and that in this setting the Mayor and Council is authorized to make a judicial determination of obscenity vel non. Similarly, with respect to proposed Ground Three, the defendants, contend that they are legally competent to determine whether plaintiff has conducted an "Adult Movie House" within 200 yards of the Methodist Church even though the Georgia statute defines an "Adult Movie House"

as a theater which shows for public viewing on a regular, continuing basis so-called "adult films" depicting sexual conduct and defines "sexual conduct" as "acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast;" and that said Act of the Legislature is in all respects constitutional.

It was stipulated that with respect to the film of July 10, 1971, four arrests were made and all arrestees were bound over to a trial court. It is not clear whether any or all of these four defendants waived commitment hearings. And with respect to the film of December 6, 1971, it is stipulated that two persons were arrested and both of the arrestees were bound over by the committing magistrate. As yet, none of these six arrested persons has been tried. It was stipulated also that some defendants were arrested and charged with selling obscene magazines on the premises of plaintiff's theater or in connection therewith and that some of these defendants have been tried and convicted and that their convictions are now on appeal.

THREE JUDGE COURT NOT REQUIRED

[1] A threshold matter is whether there exists any substantial question as to the constitutionality of the Georgia statute, so as to require the convening of a three-judge court. We are convinced that this contention of plaintiff is so insubstantial as not to warrant a three-judge court. Ex parte Poresky, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933); Hurtado, etc. v. U. S. A., 5 Cir., 1971, 452 F.2d 951.

[2,3] The power and necessity for state legislatures and municipal governments to impose restrictions through zoning laws and ordinances is no longer subject to question. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303

(1926); Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); Mosher v. Beirne, 357 F.2d 638 (8th Cir. 1966); Wallach v. City of Pagedale, Missouri, 359 F.2d 57 (8th Cir. 1966). A zoning statute or ordinance should not be declared unconstitutional unless its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395, 47 S.Ct. at 121. And the exercise of police power in this regard must be upheld if any state of facts either known or which could be reasonably assumed affords support for it. United States v. Carolene, 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234, 1242 (1938); *Goldblatt*, 369 U.S. at 596, 82 S.Ct. 987. As was said in *Mosher, supra*, 357 F.2d at 641:

> "Plaintiff fails to distinguish between civil rights and natural rights. His civil rights do not authorize the operation of a business within a municipality in violation of ordinances enacted under police power and for the welfare of the community. One has to read but little of the history of our civil rights legislation as well as constitutional amendments adopted to ascertain that our constitutional and statutory civil rights are for the protection of persons against discriminatory legislation or treatment. Here, there is no showing whatsoever of discriminatory treatment."

And as was said in Texas Co. v. City of Tampa, Fla., 100 F.2d 347, 348 (5th Cir. 1938):

> "Moreover, the mere fact that only one party operating a business is affected by a regulation designed to localize the operation of such business in a certain district in the city does not show arbitrary and unreasonable or unjust discrimination in violation of organic rights."

Motion picture theaters, like filling stations (*Texas Co., supra*) and whiskey stores (Manor v. City of Bainbridge, 136 Ga. 777, 71 S.E. 1101 (1911)) are not immune from regulation under the police power. As was said in Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721, 726 (5th Cir. 1966):

> "the right to disseminate motion pictures is not absolute. It does not mean that any motion picture can be distributed at any time, at any place, and under any circumstances."

The plaintiff would seem to argue that First Amendment rights as they attach to commercial movies are so fundamental as to be immune from valid regulation under the police power. We reject that contention, particularly where, as here, the restraint upon such movies is relatively minor and the public interest to be protected is substantial. *Chemline, supra,* at 726.

It ill befits plaintiff to question the legislative judgment that adult movie theaters are subject to zoning regulations and to being classified differently from ordinary movie theaters since plaintiff itself has resorted to classification by restricting exhibition to adults only. The Legislature and Mayor and Council are going a short step further than plaintiff by restricting the locale in which the adult theater can operate. The statute and the ordinance pursuant thereto did not prohibit the showing of adult movies; they only regulate the place of the showing. These legislative bodies may have, and doubtless did, conclude that these types of shows are undesirable in the prohibited locations in that (1) the type of clientele which may be attracted would be inimical to the best interests of the institutions and places sought to be protected, (2) although children are said to be barred they should be freed from the constant reminder that something is taking place in their midst which they must not see, and (3) there is always the possibility that self-imposed discipline may not be effective. Such reasoning has long been sufficient to

justify zoning with respect to alcoholic beverages. Whatever the reasoning was, "debatable questions as to reasonableness are not for the courts but for the Legislature . . . " *Goldblatt, supra,* 369 U.S. at 595, 82 S.Ct. at 990.

MAYOR AND COUNCIL AUTHORIZED TO MAKE JUDICIAL DETERMINATION OF OBSCENITY VEL NON AT ADVERSARY HEARING

The license ordinance of the City of Athens, as amended June 22, 1971, contains this provision:

> "Section 417. The Mayor and Council of the City of Athens shall have the right, after notice and hearing, to revoke any business license issued hereunder on the following grounds:
>
> "* * *
>
> "2. (b) Violation of a law of the State of Georgia which affects the public health, welfare and safety and which violation occurred as a part of the main business activity licensed and not merely incidental thereto."

Section 26-2101 of the Code of Georgia provides as follows:

> "26-2101. Distributing obscene materials. – (a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. . . .

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

"(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

"(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000.00 or both."

With respect to proposed ground 3 as has been noted the Georgia Legislature by Act approved April 13, 1971 authorizes the governing authority of a municipality to enact ordinances restricting the operation of adult movie houses so as to prohibit their being operated within 200 yards of any church, defining adult movie houses as hereinabove stated. Thereafter, and pursuant to said legislative authorization, the Mayor and Council of the City of Athens adopted an ordinance on July 6, 1971 prohibiting the operation of an adult movie house within 200 yards of any church.

After this complaint was filed on December 20, 1971 seeking a temporary restraining order with respect to the

hearing by the Mayor and Aldermen scheduled for the evening of the same date, counsel agreed that said hearing would be deferred pending a decision by this court. And at the hearing on the application for preliminary injunction held on December 29, 1971 it was agreed that said hearing would constitute a final hearing and that since the year was about to end and if it should happen that defendants in normal course issued a renewal of plaintiff's license prior to this court's decision said issuance would be without prejudice to the rights of any party to this case so that in effect the hearings by the Mayor and Council pursuant to said notices, if said hearings are permitted by this court, shall be with respect to such renewed license.

[4] Inasmuch as plaintiff's claimed rights fall under the broad panoply of freedom of expression, we pretermit the question whether this court would be justified in applying the doctrine of abstention.[1] We pretermit also the question whether the proposed hearing before the Mayor and Alderman is such a "proceeding(s) in a state court" as is contemplated by 28 U.S.C.A. § 2283[2] and thus completely immune from federal injunctive interference by virtue of said statute as

[1] The Court of Appeals for the Second Circuit, in Reid v. Board of Education, 453 F.2d 238, December 14, 1971, 40 L.W. 2410, stated: "The last two Terms of the Court have witnessed the rejuvenation of the full implications of the Pullman (abstention) doctrine," citing Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970) and Askew v. Hargrave, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971).

[2] In Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 225, 29 S.Ct. 67, 69, 53 L. Ed. 150, 158 (1908), Mr. Justice Holmes, for the Court, said: "We shall assume . . . that some of the powers of the commission (the State Corporation Commission) are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of the courts of the United States." See also Louisville & N. R. Co. v. Brown, 123 F. 946, 948 (5th Cir. 1903).

recently interpreted in Atlantic Coast Line R. Co. v. Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). Assuming without deciding that Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969) and Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969) are left intact by *Atlantic Coast Line R. Co.* case, *supra,* they would not require injunctive relief in the case at bar. In the instant case we do not have for protection paramount "public interests" or public rights like the right to full dissemination of public expression on public issues as in *Machesky.* Rather, we have the right of commercial exploitation of a film as in Carter v. Gautier, 305 F.Supp. 1098 (M.D.Ga. 1969) and in Gable v. Jenkins, 309 F.Supp. 998 (N.D. Ga. 1969). Although expression by means of motion pictures is included within the free expression or free press guarantee of the First and Fourteenth Amendments, the right of commercial exploitation of a film does not represent a great public interest, but amounts to a private right. Nor do we have the element of bad faith as in Sheridan v. Garrison, *supra,* or its remote forebear Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

With these pretermissions behind us we assume jurisdiction and consider the complaint on its merits.

[5,6] We agree that just as there can be no massive seizure of allegedly obscene materials for destruction without a prior adversary type hearing and determination of obscenity, Carter v. Gautier, *supra,* and cases cited, there can be no valid revocation of a business license for having exhibited an obscene film without such prior hearing and determination. It is clear, however, that defendants do not propose such illegal revocation. On the contrary, they propose to afford the plaintiff just such hearing as the Constitution requires, that is, a prior adversary judicial hearing. Carter v. Gautier, *supra,* and cases cited. It was stated in Gable v. Jenkins, 309 F.Supp. 998, 1001 (N.D.Ga. 1969): "There is proper procedure existing in the Georgia law that can achieve constitutional standards, i.e., a prior adversary judicial proceeding before the seizure of the allegedly obscene items.[3]

"[3] As examples, the following are presented: When a search warrant is applied for to seize the alleged obscene materials, the person possessing the same could be given notice of the intent to apply for the search warrant, and be given an opportunity to be present at such time, and present evidence in opposition to the issuance of the search warrant. Or an order to show cause why the alleged obscene film is not obscene could be served on the possessor, or a petition to have the film declared contraband, and subject to destruction could be served on the possessor."

The notice served upon the plaintiff shows that the proposed hearing will in all respects conform to the requirements of the City Charter and of the Constitution of the United States. Specific notice of the particular charges is given. A "full hearing" is promised with "full opportunity to present any legal evidence" with the aid of plaintiff's counsel. If, as is indicated in Gable v. Jenkins, *supra*, a hearing before a Justice of the Peace, who may not be, and frequently is not, an attorney, in connection with an application for a search warrant constitutes the prior judicial hearing required, there appears no reason why such a hearing cannot be held before the Mayor and ten Aldermen, each of whom is, by the City Charter, constituted an "ex officio . . . Justice of the Peace so far as to enable any one of them to issue warrants for offenses committed within the corporate limits of the City of Athens, to suppress riots or breaches of the peace, arrest, confine, commit or bind over offenders against the laws of this State, to answer for such offense before the proper tribunal." Georgia Laws, 1872, page 127. Any doubt as to this is laid to rest by Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964) holding that a municipal governing body in granting or denying a business license "acts as a judicial body." In elucidating the point, the court stated:

"At the outset, we note our disagreement with the district court's classification of the challenged

actions as purely those of a legislative body; we do not conceive the denial of an application for a license to be an act of legislation. Although there is disagreement on the matter, see 73 C.J.S. Public Administrative Bodies and Procedure, § 71, at 398, we prefer the view that licensing proper is an adjudicative process. Thus when a municipal or other governmental body grants a license it is an adjudication that the applicant has satisfactorily complied with the prescribed standards for the award of that license. Similarly the denial of a license is based on an adjudication that the applicant has not satisfied those qualifications and requirements. On the other hand, the prescription of standards which must be met to obtain a license is legislation, since these standards are authoritative guides for future conduct derived from an assessment of the needs of the community. A governmental agency entrusted with the licensing power therefore functions as a legislature when it prescribes these standards, but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them.

"Since licensing consists in the determination of factual issues and the application of legal criteria to them – a judicial act – the fundamental requirements of due process are applicable to it."

We are confirmed in this view by the fact that in the event of an adverse decision by the Mayor and Aldermen the plaintiff would be entitled to obtain a review thereof by certiorari to the appropriate superior court and to obtain from such court "a supersedeas of the judgment until the final hearing in the superior court." Ga. Code, Title 19-101, 19-203, 19-213.[3] In

[3] Moreover defense counsel stated in open court that in the event of a ruling in this case favorable to the Mayor and Council, the defendants would withhold actual revocation until plaintiff has had full opportunity to exhaust all appellate review.

City of Cedartown v. Pickett, 193 Ga. 840, 842, 20 S.E.2d 263, 265 (1942), it is stated:

> "Although certiorari is not an appropriate remedy to review or obtain relief from the judgment, decision, or action of an inferior judicatory or body rendered in the exercise of legislative, executive, or ministerial functions, such a writ does lie for the correction of errors in decisions by municipal corporations, courts or councils, like other inferior judicatories, when rendered in the exercise of their judicial powers."

See also Attaway v. Coleman, 213 Ga. 329, 99 S.E.2d 154 (1957).

The holding in *Hornsby* is not new to Georgia Law. Georgia Code Section 69-301 expressly recognizes that Municipal Corporations may exercise judicial powers. Sometime between 1854 and 1856 the Mayor and Council of the City of Rome, Georgia refused to issue a liquor license and were sued for damages. The trial court dismissed the action and in reviewing the case the Supreme Court of Georgia asked:

> "Can an action in any form be maintained against a municipal corporation for an error in judgment, only when exercising judicial functions ....?" And ansered, "We think not." Duke v. Mayor & City of Rome, 20 Ga. 635 (1856).

NO PRIOR RESTRAINT

[7] No violation of the constitutional right against prior restraint is threatened. The films complained of have been exhibited without any prior censorship. A major question at the hearing will be whether the films already shown were obscene. The landmark previous restraint case, Near v.

Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), recognizes that a publisher cannot be restrained by a prior order from publishing what he desires to publish, but in no sense exonerates the publisher from liability for what he has published. The case quotes Blackstone as follows:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity,"

and quotes further Chief Justice Parker in Com. v. Blanding 3 Pick. 304, 313, 15 Am. Dec. 214, as follows:

> "Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse."

The purpose of the proposed hearing is not to place upon plaintiff any previous restraint with respect to any films it may plan to show, but to call plaintiff to account and to hold the plaintiff responsible for its alleged past abuses of its unquestioned right of immunity from previous restraint. Of course, if its license is revoked for twelve months (the

maximum period of revocation authorized by the city ordinance) the result will be that it cannot do business in the City of Athens during such revocation period. The non-exhibition of films obscene or non-obscene during said period would not be the result direct or indirect of previous restraint, but would result incidentally from past abuses of immunity from previous restraint just as a person convicted and imprisoned for criminal libel might be incidentally and indirectly prevented and thus practically restrained from any and all publications during the period of incarceration.

ORDINANCE SECTION 417 NOT UNCONSTITUTIONAL

[8] We have carefully considered all of plaintiff's complaints against Section 417 of the Municipal Ordinance authorizing after notice and hearing revocation of a public license on the ground of "violation of a law of the State of Georgia which affects the health, welfare and safety and which violation occurred as a part of the main business activity licensed and not incidental thereto" and are convinced that said ordinance is not void for overbreadth, or for failing to provide standards to guide in the revocation, or for vagueness, or as imposing "prior restraint", or as precluding the right of judicial review, or for any other reason alleged. We think the statute contains sufficient guidelines specifically outlining those grounds for revoking a license and that the ordinance sufficiently indicates to both Mayor and Aldermen and any licensee what conduct may result in a revocation of a license, namely, any violation of a law of the State of Georgia, meaning any valid enactment by the Legislature approved by the Governor which affects the public health, welfare and safety and which violation occurred as a part of the main business activity licensed and not merely incidental thereto. As above indicated, there is a valid Georgia statute making it a criminal offense to exhibit obscene material and also a valid Georgia statute making it a criminal offense to operate an adult movie house within 200 yards of

any church. All persons are charged with knowledge that such statutes exist and it could hardly be contended that a violation of such statutes does not affect public health, welfare and safety. Moreover, the ordinance not only specifies what conduct shall constitute grounds for revocation, but provides constitutional due process through notice and hearing.

CONCLUSION

Accordingly, a declaratory judgment is hereby rendered that the provisions of Section 417 of the license ordinance of the City of Athens and the zoning statute complained of are constitutionally valid facially and as applied to businesses like plaintiff's involving the operation of a movie theater.

This court finds and concludes further that no constitutional rights of plaintiff are being violated or threatened by the action proposed to be taken by the Mayor and Aldermen in providing a full hearing to plaintiff as specified in said notices, it being presumed that the defendants as public officials will do their duty and comply with all requirements of the law, and accordingly all of the prayers of the complaint are hereby denied.

This memorandum opinion is intended to suffice as findings of fact and conclusions of law.

APPENDIX "B"

---

106 FORSYTH CORPORATION d/b/a
Paris Theatre, Plaintiff-Appellant,
v.
Julius F. BISHOP, in his capacity as
Mayor of the City of Athens, Etc., et al.,
Defendants-Appellees.
No. 72-1389.
United States Court of Appeals,
Fifth Circuit.
July 19, 1973.

Before TUTTLE, COLEMAN and CLARK, Circuit Judges.

PER CURIAM:

On the authority of Paris Adult Theatre I v. Slaton, ___ U.S. ___, 93 S. Ct. 2628, 37 L.Ed. 2d 446 (1973), the judgment appealed from is affirmed. The opinion of the district court is reported at _____ F. Supp. _____ [Athens Division Middle District of Georgia, 1972].

In affirming the court below we hold that premising the revocation of a movie house license upon a violation of a valid state law or city ordinance forbidding the exhibition of sexually explicit material does not violate the right of free speech vouchsafed under the First Amendment.

Moreover, we find no constitutional infirmity in the revocation procedures under the circumstances of this case. We do not reach the question whether the city council hearing combined with the right of the losing party to *seek* certiorari from the Superior Court, Georgia Code 19-101, which is granted only when "sanctioned" by the Superior Court judge, Georgia Code 19-203, would provide the full

adversary judicial determination of obscenity required by the Supreme Court before final restraint. Freedman v. Maryland, 380 U.S. 51, 58, 85 S. Ct. 734, 13 L.Ed. 2d 649; Paris Adult Theatre I v. Slaton, *supra*, ___ *U.S. at* ____, 93 S.Ct. at 2628.

Whatever question may be raised about the nature of the review afforded under the Georgia law and the right to have supersedeas pending final appeal thereafter under other circumstances no such question stated is present here. The trial court stated

> defense counsel stated in open court that in the event of a ruling in this case favorable to the mayor and council the defendants would withhold actual revocation until plaintiff has had full opportunity to exhaust all appellate review.

Thus, the plaintiff is assured that it will get its question whether these showings were protected by the First Amendment finally determined by the highest court of the State of Georgia, and then have an opportunity to have that decision reviewed in the Supreme Court of the United States if it desires to do so, before any restraint by way of revocation of its license can occur.

We express no opinion as to whether the Georgia obscenity statute, Ga. Code § 26-2101, or that portion of the Athens city ordinance promulgated pursuant to Ga. Code § 23-3401 et seq. which defines "sexual conduct" are constitutional in all respects. The construction and interpretation of these Georgia laws and ordinances is a task for the Georgia courts, United States v. 12 200-Ft. Reels, ____ U.S. ____ 993 S. Ct. 2665, 37 L. Ed. 2d 500 (1973) (# 70-2, June 21, 1973, 41 L.W. 4961); Paris Adult Theatre I v. Slaton, *supra*. An abstract federal review of all possible applications of these provisions would be improper. The right of the plaintiff to have the First Amendment issues resolved

in a federal form will be adequately protected if it is accorded at the time when the city specifically attempts to apply either regulation more broadly than the new standards enuncaited by the Supreme Court will permit.

Affirmed.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1389

106 FORSYTH CORPORATION
d/b/a PARIS THEATRE,
Plaintiff-Appellant,

versus

JULIUS F. BISHOP, In his capacity as Mayor
of the City of Athens, Etc., ET AL.,
Defendants-Appellees.

,Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING

(Filed: NOVEMBER 2, 1973)

Before TUTTLE, COLEMAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "D"

STATUTORY AND CONSTITUTIONAL PROVISIONS

A. Section 417 of the License Ordinance of the City of Athens, Georgia, 1971 as amended.

An Ordinance to Amend the License Ordinance of the City of Athens for the Year 1971 and for Other Purposes

Be it ordained by the Mayor and Council of the City of Athens and by authority of the same, it is hereby ordained as follows:

Section 1. Section 417 of the License Ordinance of the City of Athens, Georgia 1971 is hereby amended by renumbering the first paragraph of No. 2 as 2(a) and by creating a No. 2(b) to read as follows:

"(b) Violation of a law of the State of Georgia which affects the public health, welfare and safety and which violation occurred as a part of the main business activity licensed and not merely incidental thereto."

So that the same, after amendment, shall read in part as follows:

"Section 417. The Mayor and Council of the City of Athens shall have the right, after notice and hearing, to revoke any business license issued hereunder on the following grounds:

2.(a) Violation of other ordinances of the City pertaining to the carrying on of such business such as would affect the health, safety and welfare of the public.

2.(b) Violation of a law of the State of Georgia which affects the public health, welfare and safety and which violation occurred as a part of the main business activity licensed and not merely incidental thereto."

Section 2. All Ordinances or parts of Ordinances in conflict herewith are repealed.

[Adopted June 22, 1971]

B. First, Fifth and Fourteenth Amendments, U.S.C.

FIRST AMENDMENT,
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT,
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; now shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CIVIL ACTION
FILE NUMBER 792

106 FORSYTH CORPORATION
d/b/a PARIS THEATRE,
Petitioner,

versus

JULIUS F. BISHOP,
In His Capacity As Mayor
Of The City of Athens
City Hall,
Athens, Georgia; and

In Their Capacity As Aldermen
And Members Of The Council Of
The City Of Athens,
City Hall,
Athens, Georgia:

LUTHER T. BOND,
W. CALVIN BRIDGES,
DWAIN P. CHAMBERS,
LEE H. GUEST,
HUGH R. HALE,
JOSEPH R. HOOTEN, JR.,
ROBERT H. KIMBRELL,
PAUL J. OELAND,
EDWARD L. TURNER, and
J. COMER WHITEHEAD.

Defendants,
Jointly and Severally.

Filed: December 20, 1971

Serve On The Honorable OLIN PRICE,
City Recorder For The City of Athens,
City Hall,
Athens, Georgia.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Petitioner, by and through its attorneys at law, D. FREEMAN HUTTON, Esquare, ROBERT EUGENE SMITH, Esquire, and R. BRUCE LOWRY, Esquire, complaining of Defendants jointly and severally, respectfully alleges as follows:

I.

JURISDICTION

1.

This is a civil action whereby Petitioner prays a temporary restraining order, a preliminary injunction, and a permanent injunction issue to restrain Defendants and each of them from acting under *Section 417(2)(b)* of the License Ordinance of the City of Athens, Georgia 1971 to seek the revocation of Petitioner's business license, or should it be revoked, from then enforcing ordinance provisions prohibiting operation of a business without said license. Petitioner prays as well a declaratory judgment to determine the constitutionality of *Section 417* of the License Ordinance of the City of Athens, Georgia 1971, as amended by an ordinance adopted on June 22, 1971, as written and as applied and threatened to be applied against Petitioner. The allegations to be set forth in the premises are that there are present question of actual controversy between the parties regarding substantial constitutional issues.

2.

Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions herein presented under *Title 28 U.S.C. § 1343(3)*, which provides, in pertinent part, that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege of immunity secured by the *Constitution of the United States* . . . ."

and the organic law which authorizes the institution of this suit, founded on *Title 42 U.S.C. § 1983*, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the *Constitution* and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Suit is further founded on *Title 28 U.S.C. § 1343(4)* "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . ." as well as *Article III, Section 2* of the *Constitution of the United States.*

II.

PARTIES

3.

106 FORSYTH CORPORATION, Petitioner, doing business as PARIS THEATRE, located at 140 East Washington Street, Athens, Georgia, is a Georgia corporation and is engaged, through its agents, servants and employees, in the exhibition of movies presumptively protected by the *First Amendment* to the *Constitution of the United States,* pursuant to a license issued by the City of Athens authorizing it to operate a business providing "motion picture entertainment."

The movies exhibited are comparable to those declared not to be obscene by the Supreme Court of the United States and many inferior Federal Courts and hence, are protected expression under the *First Amendment* to the *Constitution.* No exhibitions are made by Petitioner to minors under the age of eighteen (18) years of age.

4.

Upon information and belief, JULIUS F. BISHOP is named as a Defendant in his capacity as Mayor of the City of Athens, Georgia, having cognizance of the enforcement of City Ordinances were designated, and having supervisory direction over the Chief of Police and the disposition and discipline of the various officials of the City of Athens, and is particularly responsible for the approval of the Ordinances of the City of Athens and the enforcement thereof, including *Section 417.*

5.

Upon information and belief, the Council of the City of Athens, Georgia is composed of Defendants LUTHER T. BOND, W. CALVIN BRIDGES, DWAIN P. CHAMBERS, LEE H. GUEST, HUGH R. HALE, JOSEPH R. HOOTEN, JR., ROBERT H. KIMBRELL, PAUL J. OELAND, EDWARD L. TURNER, and J. COMER WHITEHEAD, and said persons are named Defendants in that the Council, with the Mayor, has the legislative prerogative under City of Athens Licensing Ordinance for the year 1971, *Section 417,* as amended, to revoke the business license previously granted Petitioner.

6.

The named Defendants, in their official capacities only as aforesaid, and joined herein to make enforceable and binding upon them and/or their agents, servants, employees and attorneys, any temporary restraining order, preliminary and/or permanent injunction, declaratory judgment and/or other order that may issue by this Court.

III.

FACTUAL ALLEGATIONS

7.

At all times relevant hereto, Defendants and/or their agents, servants, employees and attorneys, and other under their direction and control, and each of them separately and in concert, acting under color and pretense of law, to-wit: under color of ordinances, regulations, customs and usage of the City of Athens, are threatening to deprive Petitioner, its agents, servants and employees, of rights, privileges and immunities secured to them by the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States.*

8.

On June 22, 1971, the Mayor and Council of the City of Athens passed "An Ordinance Of The City Of Athens For The Year 1971 And For Other Purposes," pertinent portions of which read as shown Exhibit "A" attached hereto and made a part hereof by reference.

9.

Pursuant to authority granted in said Ordinance, the Mayor and Council of the City of Athens have notified Petitioner

> "to show cause before the Mayor and Council of the City of Athens at 6:30 P.M., on the 20th day of December, 1971, in Council's Chambers, at the City Hall, Athens, Georgia, as to why your business license for the operation of a motion picture theatre or movie theatre at 140 East Washington Street, Athens, Georgia, should not be revoked for the following reasons . . . ."

A copy of said notice is attached hereto as Exhibit "B" and made a part hereof by reference.

10.

The reasons given for the threatened revocation are as follows:

"1. That on December 6, 1971, at your place of business located at 140 East Washington Street, Athens, Georgia, you did intentionally promote, advance, assist, and abet in violation of *Section 26-2101*, Georgia Code (1933) (Ga. Laws 1968, pp. 1249-1302) whereby for an admission fee, you did show, project, exhibit, and disseminate to the general public, including Douglas Towns and Sgt. John Crawfored one untitled color motion picture film without sound comprising three separate segments with approximately a playing time of 23 minutes duration, along with a color motion picture entitled 'Hubbie's Gone Hunting' with sound track and playing time of about 60 minutes; said movies contained obscene and indecent scenes and acts by nude women and men of sexual intercourse, cunnilingus, and fellatio which material considered as a whole and applying contemporary community standards predominately appeals to the prurient interest in nudity, sex, and excretion and is utterly without redeeming social value and transgresses substantially beyond customary limits of candor in describing and representing such matters, contrary to the laws of this State as aforesaid.

2. That on the 10th day of July, 1971, at your place of business located at 140 East Washington Street, Athens, Georgia, you did intentionally promote, advance, assist, aid and abet in the violation of *Section 26-2101*, Georgia Code (1933) (Ga. Laws

1968, pp. 1249-1302), whereby for an admission fee you did show, project, exhibit, and disseminate to the general public, including W. Tate Brown, Captain W. E. McKinnon, and John Strauss an obscene motion picture, being an untitled Film # 131; which film contained obscene and indecent acts of sexual intercourse between nude men and women, which material when considered as a whole and applying contemporary community standards predominately appeals to the prurient interest in nudity, sex, or excretion and is utterly without redeeming social value and transgresses substantially beyond customary limits of candor in describing and representing said matters, contrary to the laws of said State as aforesaid."

11.

Petitioner shows further that despite written demands dated September 3, 1971, pursuant to *Georgia Code* § *27-1403* by its attorneys made upon both Thomas W. Ridgway, the District Attorney for the Western Judicial Circuit, and Ken Stula, the Solicitor of the State Court of Clarke County, in both instances by certified mail, return receipt requested, and upon oral demand of Ken Stula as to the December 6, 1971 incident, neither Petitioner, nor its attorneys, have received copies of any accusations or indictments in regard to criminal charges against Petitioner or any of its employees, arising out of the showings on the dates alleged, of the movies referred to in the notice to Petitioner.

12.

Neither Petitioner, nor any of its agents, servants or employees, have ever been tried, let alone convicted, for violating *Georgia Code* § *26-2101* by showing the films referred to in the notice of Defendants to Petitioner, and Petitioner shows further that said films are not obscene as a matter of law in the constitutional sense.

IV.

BASIS IN LAW FOR RELIEF

13.

The aforesaid conduct of Defendants, their agents, servants, employees and attorneys, and others acting under their directed and control, and each of them, in seeking to revoke Petitioner's business license under the conditions here present is a "prior restraint", condemned by the *Constitution of the United States*, having a "chilling effect" upon the exercise of Petitioner's constitutional rights; more particularly, those rights secured by the *First, Fourth* and *Fifth Amendments*, made obligatory on the States under the *Fourteenth Amendment*. The conduct of Defendants, their agents, servants and employees, in seeking to revoke Petitioner's business license is in deprivation of Petitioner's rights to due process under the *Fifth Amendment* to the *Constitution*, as well as an all too effective restraint on the exercise of Petitioner's right to exhibit presumptively protected movies to the interested adult public.

14.

As a further result of the conduct of Defendants, their agents, servants, employees and attorneys, the Petitioner has been required to retain attorneys to counsel and to either appear before the City Council hearing with regard to the City of Athens License Ordinance, or otherwise defend Petitioner's rights. Said Ordinance is know, or should be known, by Defendants, their agents, servants, employees and attorneys, to have been applied to Petitioner in a manner repugnant to the *First, Fourth, Fifth, Sixth*, and *Fourteenth Amendments* to the *Constitution of the United States*.

15.

As a further result of the conduct of Defendants, their agents, servants, employees and attorneys, the Petitioner has

been intimidated in its trade and business, and if the license of Petitioner is revoked, it will suffer complete loss of profits, as well as damages as a result of the substantial interference with Petitioner's advantageous business relations.

16.

By reason of the conduct of Defendants, their agents, servants or employees, as aforesaid, Petitioner's civil rights and those of its agents, servants, and employees, under the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution,* have been violated to their irreparable harm. Unless enjoined, Defendants, their agents, servants, employees and attorney, will continue to the course of conduct to Petitioner's further imminent and irreparable harm, for which Petitioner has no plain adequate remedy at law; and the conduct of Defendants, their agents, servants, employees and attorneys, has had and threatens to have a continuing "chilling effect" on the Petitioner's exercise of its *First Amendment* freedoms. Immediate and irreparable injury, incalculable loss, and damage will result to Petitioner if a temporary restraining order and, after hearing, a prelininary injunction, is not issued forbidding Defendants, their agents, servants, employees and attorneys, from continuing in their proposed wholly illegal conduct as aforesaid, under color of enforcing said City Ordinance.

17.

The provisions of City of Athens License Ordinance, *Section 417,* as amended, are repugnant to the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States,* as written and as the same has been applied by Defendants, their agents, servants, employees and attorneys, to the detriment of Petitioner, its agents, servants and employes, for each of the following reasons:

(a) Said Ordinance provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the Ordinance sets forth no standards to guide the administrative and legislative officials thereunder in revoking, or attempting to revoke, the business licenses of firms engaged in the exhibition for profit of presumptively protected *First Amendment* materials; further,

(b) Said Ordinance provisions, with repsect to revocation or suspension of business licenses, are void for vagueness in that the same permit the revocation of a business license in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such, are repugnant to the due process clause of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States;* further

(c) Said Ordinance provisions are void for vagueness and impermissible overbreath in the area of *First Amendment* freedoms, because said provisions are susceptible of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of federal and state constitutional rights of citizens of the State of Georgia and of the United States, as well as Petitioner, to exhibit and/or view motion picture films; further,

(d) Said Ordinance provisions are repugnant to the substantive due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and

capricious means by Defendants and/or their agents, servants, employees and attorneys without a showing of any real and substantial relationship to the City's subordinating interest which is compelling to justify city action limiting the exercise by Petitioner of its *First Amendment* freedoms; further,

(e) Said Ordinance provisions are impermissibly broad and repugnant to the procedural due process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution* by employing means lacking adequate safeguards which due process demands to assure non-obscene materials sought to be exhibited as a business activity the constitutional protection of the *First Amendment*, to which they are entitled; further,

(f) Said Ordinance provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution* in that said Ordinance provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Petitioner's *First Amendment* rights by Defendants; further,

(g) Said Ordinance requires that the burden of proof and persuasion be upon Petitioner, all of which has been found to be unconstitutional "prior restraint" upon the exercise of *First Amendment* freedoms by the United States Supreme Court; further,

(h) Said Ordinance appears to preclude the right of judicial review in an adversary hearing wherein the censor (in this case, the Mayor and Councilmen, by their agents, servants, employees and attorneys) assumes the burden of instituting judicial review and

meeting the heavy burden of proof so as to protect those inalienable rights secured to the citizens by the *Constitution* and the laws thereunder; further,

(i) That there is no subordinating interest of the City shown in the Ordinance requiring prior restraint of speech presumptively protected under the *First* and *Fourteenth Amendments* sufficient to invoke the police power of the City for the preservation of its citizens' health, safety and welfare, all of which is at variance with the freedoms guaranteed to the citizens of the City of Athens and the State of Georgia, and the other forty-nine states, by the *First* and *Fourteenth Amendments* of the *Constitution of the United States.*

V.

RELIEF SOUGHT

18.

Petitioner is further entitled to and desires that this Court enter a declaratory judgment on final hearing under the provisions of *Title 28 U.S.C.* § *2201* and *Rule 57* of the *Federal Rules of Civil Procedure*, declaring *Section 417* of the License Ordinance of the City of Athens for the Year 1971, as amended, as applied so far as it may pertain to revocation or suspension of business licenses for the exhibition of presumptively protected *First Amendment* materials to be unconstitutional as the same has been and is being applied to Petitioner, its agents, servants, and employees, by Defendants herein, their agents, servants, employees and attorneys.

19.

The Petitioner is entitled to and desires that this Court issue a temporary restraining order and then, after hearing, a

preliminary injunction restraining and enjoining each of the Defendants, their agents, servants, employees and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert with them, from continuing the following unconstitutional and unlawful acts, to-wit: attempting to revoke Petitioner's business licensed by use of the unconstitutional procedures complained of hereinpending; a hearing and determination on the application for permanent injunction herein; and, after said hearing, Petitioner is entitled to a permanent injunction.

WHEREFORE, Petitioner prays:

(1) That a temporary restraining order issue restraining Defendants, their agents, servants, employees and attorneys, from proceeding with the hearing scheduled for 6:30 P.M. on December 20, 1971, wherein Petitioner has been notified that it must show cause why its business license should not be revoked, or from refusing to renew Petitioner's license on the same grounds, until further order of this Court;

(2) That a preliminary injunction of this Court issue upon hearing restraining Defendants, their agents, servants, employees and attorneys, pending a hearing and determination on Petitioner's application for permanent injunction, from taking any action under the License Ordinance of the City of Athens, as amended, to revoke Petitioner's business license, or from refusing to renew Petitioner's license on the same grounds;

(3) That Defendants and each of them be required to forthwith answer this complaint in conformance with the rules and practices of this Honorable Court;

(4) That this Court declare the provisions of *Section 417* of the License Ordinance of the City of Athens, as amended, as applied, insofar as it may pertain to revocation of business licenses to be unconstitutional as written and/or as applied to

those businesses like Petitioner's involving the exercise of the Free Speech and Free Press provisions of the *First Amendment* to the *Constitution*, as well as to the Petitioner under the facts alleged herein;

(5) That a permanent injunction issue restraining Defendants, their agents, servants, employees and attorneys, and any and all other persons acting under their direction and control, from enforcing or executing *Section 417* of the License Ordinance of the City of Athens in an unconstitutional manner, or to apply it in a manner to obtain unconstitutional results with respect to this Petitioner, its agents, servants, and employees and further, order and direct that the Defendants, and each of them, be enjoined from seeking to revoke the business license of Petitioner;

(6) That Petitioner have such other and further relief as may be appropriate under the circumstances in this case, together with costs.

Respectfully submitted,

/s/ D. FREEMAN HUTTON, Esquire
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/s/ R. BRUCE LOWRY, Esquire
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(404) 549-1167

Attorneys for Petitioner

APR 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1176

106 FORSYTH CORPORATION, d/b/a PARIS THEATRE,
Petitioner,

versus

JULIUS F. BISHOP, In His Capacity As Mayor Of The City of Athens, Georgia; and Aldermen and Members Of The Council Of The City Of Athens, Georgia,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH J. GAINES
304 Southern Mutual Building
Athens, Georgia 30601

Attorney for Respondents

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Paris Adult Theatre I, et al., Petitioners, v. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, et al., 93 S. Ct. 2628 (1973), (No. 71-1051) 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1176

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106 FORSYTH CORPORATION, d/b/a
PARIS THEATRE,

Petitioner,

versus

JULIUS F. BISHOP, In His Capacity As Mayor Of The City of Athens, Georgia; and Aldermen and Members Of The Council Of The City Of Athens, Georgia,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Petitioner's statement of the question presented is not a fair presentation. The revocation provisions of the Business License Ordinance complained of provides that the Mayor and Council of the City of Athens as a body corporate shall have the right, after notice and a hearing, to revoke any business license issued on the ground of a violation of the law of the State

of Georgia which affects the public health, welfare, and safety, and occurred as a part of the main business activity licensed and not merely incidental thereto. Such revocation could only be for a period of twelve months.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner failed to include as a part of its petition the relevant portion of the ordinance in question providing the period of revocation of a business license shall be twelve months. See Appendix A of this brief.

STATEMENT OF THE CASE

The first paragraph of petitioner's Statement of the Case is inaccurate to the extent that it does not disclose that the notice with respect to a hearing on the question of revocation was sent out on behalf of the body corporate known as the Mayor and Council of the City of Athens, which is the official corporate name of said municipality. The Board of Aldermen of said municipality acts as its governing authority with the Mayor as its chief executive voting only in cases of a tie on matters before the Council. Additionally, as previously noted, the petitioner's petition fails to contain the relevant portion of Section 417 of the said business license ordinance which provides the period of revocation shall be for twelve months.

Respondents do not agree that Section 417 of the Business License Ordinance of the City of Athens,

Georgia would facially require the City Council and Mayor to revoke the business license. The right of revocation is conferred upon the body corporate known as the Mayor and Council of the City of Athens, acting by and through its governing authority, the Board of Aldermen, with the Mayor as chief executive voting only in case of a tie between the Aldermen. Section 417 of said Business License Ordinance of the City of Athens provides in part that the body corporate known as the Mayor and Council of the City of Athens shall have the right, after notice and hearing, to revoke any business license issued for a violation of a law of the State of Georgia, which affects the public health, welfare, and safety, and which violation occurred as a part of the main business activity licensed and not merely incidental thereto. The governing authority may or may not revoke such license based upon what is shown at the hearing.

Petitioner's comments in its Statement of the Case to the effect that the ordinance was obviously designed to selectively apply to petitioner's business operation is not supported by the record.

Petitioner's reference in the last two paragraphs of its Statement of the Case to the Mayor's appearance as a witness in a criminal prosecution and the disposition of certain criminal cases against employees is immaterial to the case before the court.

REASONS WHY WRIT SHOULD BE DENIED

The decision of the United States Court of Appeals for the Fifth Circuit complained of squares with the

decisions of this Court. *Paris Adult Theatre I, et al., Petitioners* v. *Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, et al.*, 93 S. Ct. 2628 (1973), (No. 71-1051). Respondents stand on the decision and the reasons advanced for the same and supporting authority cited therein. Respondents do point out that Section 417 of the Business License Ordinance of the City of Athens provides that the body corporate known as the Mayor and Council of the City of Athens may, after notice, hold a hearing for the purpose of determining whether or not to revoke a business license issued for a violation of a law of the State of Georgia, which affects the public health, welfare, and safety, and which violation occurred as a part of the main business activity licensed and not merely incidental thereto. This revocation may only be for a period of twelve months. There is no prior restraint involved in the case before the court. The movies in question were exhibited after the adoption of the relevant ordinances and prior to the institution of the present proceedings. This is not a case where the City of Athens is seeking to license the showing of movies or is attempting to set up a censorship board for that purpose. Section 417 of the Business License Ordinance of the City does not single out movie houses or any other type of business with respect to a possible revocation of its business license. The ordinance in question furnishes a sufficient standard to guide conduct, which is that any licensee should avoid as a part of its main business activity the violation of a law of the State of Georgia affecting the public health, welfare, and safety. There is nothing predetermined about this proceeding, and it may well be that the governing authority of the City, after viewing

the movies in question, may determine the same are not obscene. If it were determined that a revocation would be justified, petitioner would be accorded all rights of appellate review, including that to the highest court of the land, if it so chooses.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit is constitutionally sound, and accordingly petitioner's petition for the writ of certiorari should be denied.

Respectfully submitted,

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Athens, Georgia 30601
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Counsel for Respondents

APPENDIX "A"

Adopted by Mayor and Council of the City of Athens on June 15, 1971.

AN ORDINANCE TO AMEND THE LICENSE ORDINANCE OF THE CITY OF ATHENS, GEORGIA FOR THE YEAR 1971, SO AS TO PROVIDE CERTAIN PROHIBITIONS AND RESTRICTIONS PERTAINING TO REVOCATION OF LICENSES FOR CAUSE, AND FOR OTHER PURPOSES.

BE IT ORDAINED by the Mayor and Council of the City of Athens and by authority of the same, it is hereby ordained as follows:

SECTION 1. Section 417 of that ordinance entitled "License Ordinance of the City of Athens, Georgia (1971)" is hereby amended by adding the following No. 5 to said Section 417 thereof:

"(5) Where a business license is revoked for cause by the Mayor and Council of the City of Athens, no business license shall be thereafter issued to such licensee for a period of twelve (12) months from the date of said revocation to engage in the type of business for which said license was issued and revoked. A license to engage in the type of business for which said license was issued and revoked shall not be issued to any person, firm, corporation, or

other entity which has an agent, employee, officer, or stockholder of the firm whose license was revoked for cause employed in a position of management or control of its operations or an integral part of its enterprise, or who aided and abetted in the violation of the law or other practices resulting in said revocation for cause of a business license. The period of twelve (12) months shall run from the date of the revocation of the license of the firm or entity with whom such agent, employee, officer, or stockholder was associated with. A stockholder shall be defined to be one owning or having the control of at least twenty per cent (20%) of the issued stock in the corporation whose license was revoked for cause."

SECTION 2. All ordinances or parts of ordinances in conflict herewith are repealed.

CERTIFICATE OF SERVICE

It is hereby certified that this brief has been duly served upon Mr. Robert Eugene Smith, Esquire, 2005 One Hundred Colony Square, Atlanta, Georgia 30361; Mr. Gilbert H. Deitch, Esquire, 2005 One Hundred Colony Square, Atlanta, Georgia 30361; and Mr. R. Bruce Lowry, P. O. Box 222, Athens, Georgia 30601, Attorneys of Record for the Petitioner in the foregoing matter, in conformity with the Rules of this Court, by depositing in the United States mail with first class postage

prepaid, appropriate copies of the same in a properly addressed envelope at their post office addresses.

This ____ day of April, 1974.

Joseph J. Gaines
304 Southern Mutual Building
Athens, Georgia 30601

Attorney for Respondents,
Julius F. Bishop, In His
Capacity as Mayor of the City
of Athens, et al.